



Decision

Matter of: Solid Waste Integrated Systems Corporation
File: B-258544
Date: January 17, 1995

Charles F. Holum, Esq., Doherty Rumble & Butler, for the protester.
James E. Pennington for Warren & Baerg Manufacturing, Inc., an interested party.
Gregory H. Petkoff, Esq., Maj. Stewart L. Noel, and Capt. F. Scott Risley, Department of the Air Force, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the acceptability of the awardee's "equal" product in a brand name or equal procurement is denied where the procuring agency reasonably determined that the product met all the solicitation's technical requirements as set forth in the stated salient characteristics of the brand name.

DECISION

Solid Waste Integrated Systems Corporation (SWIS) protests the award of a contract to Warren & Baerg Manufacturing, Inc. under invitation for bids (IFB) No. F65503-94-B-0017, a two-step sealed bid procurement issued on a "brand name or equal" basis by the Department of the Air Force for a refuse derived fuel system at Eielson Air Force Base (AFB), Alaska. SWIS argues that Warren & Baerg's "equal" cuber, a component of the system, does not satisfy the requirements of the IFB and that Warren & Baerg's bid should therefore have been rejected.

We deny the protest.¹

¹A protective order was issued in this case, and counsel for the protester and an expert/consultant retained by counsel were admitted to the protective order, and received access to Warren & Baerg's proposal and the agency's evaluation documentation. See 4 C.F.R. § 21.3(d) (1994).

The refuse derived fuel system sought by the IFB will process waste, such as cardboard, paper, and wood products, to produce densified cubes that will be burned in the facility's power plant. Bidders were informed that the system equipment would typically consist of a tub grinder, shredder/hammermill, metering box, leveling controls, cuber, conveyers with and without magnetic separators, and dust control system, although proposed systems may vary. The system was required to process a minimum of 6 tons of waste per hour for 8 hours per day and to produce cubes of approximately 1.56 square inch cross sectional area (1.25-inch by 1.25-inch) with a density of approximately 30 pounds per cubic foot. Bidders were also informed that the system proposed must fit in the building provided by the agency and if modifications to the building or foundation were required, the costs of these modifications were to be included in the bid price. In addition, the IFB, in pertinent part, described the system's cuber as follows:

"Cuber (Model 92-500T, Cooper Equipment, Inc. or equal) Minimum flow rate = 6 tons per hour."

The IFB incorporated by reference the "brand name or equal" clause contained in the Defense Federal Acquisition Regulation Supplement § 252.210-7000 (1991 ed.), which in pertinent part provides:

"The 'brand name or equal' description is used to portray the characteristics and level of quality that will satisfy the [g]overnment's needs. The salient physical, functional and other characteristics which 'equal' products must meet are specified in the solicitation."

The IFB announced that the procurement would be conducted using the two-step sealed bidding procedures in accordance with Federal Acquisition Regulation (FAR) subpart 14.5. Under step one of a two-step sealed bid procurement, bidders submit technical proposals, which the agency evaluates to determine the technical acceptability of the supplies offered, leaving only price to be addressed in the second step. In step two, bidders whose proposals have been found to be acceptable, submit bids based on their acceptable technical proposals.

The IFB stated the following evaluation factors and subfactors for the evaluation of step one proposals:

Ease of operation/level of labor required
Proven history/other current uses
Economical analysis

- a. Maintainability
- b. Life expectancy
- c. Utility requirements
- d. Utility consumption

Quality of the pellet

The Air Force received proposals from three bidders.² The proposals of SWIS and Warren & Baerg were determined to be technically acceptable while the proposal of the third bidder was determined to be unacceptable. Bids were requested from SWIS and Warren & Baerg, and at the August 19, 1994, bid opening the Air Force received the following bids:

Warren & Baerg	\$798,437 ³
SWIS	\$818,000 ³

On August 22, SWIS protested to the agency that Warren & Baerg's proposed "equal" cuber was not the equal of the specified Cooper "brand name" cuber. On September 8, the Air Force informed SWIS that Warren & Baerg's proposed equipment satisfied the salient characteristics specified in the IFB and denied SWIS's agency-level protest. This protest to our Office followed.

SWIS argues that Warren & Baerg's proposed cuber is not the equal of the specified brand name. Specifically, the protester complains that the brand name cuber, which it offered, is of "much heavier duty [than Warren & Baerg's proposed equal cuber] and thus will last longer and be less expensive in the long run." The Air Force responds that Warren & Baerg's proposed "equal" cuber satisfied all the salient characteristics specified in the IFB; that is, Warren & Baerg's cuber satisfied the minimum flow rate requirement of 6 tons per hour, as well as the requirements concerning the size and density of the cube to be produced. In addition, the Air Force states that Warren & Baerg's and

²SWIS submitted two technical proposals, both offering the Cooper "brand name" cuber.

³SWIS also submitted a bid of \$883,000 for its alternate technical proposal.

SWIS's step-one proposals were evaluated under the stated evaluation criteria and found technically acceptable.

The overriding consideration in determining the equivalency of an offered product for purposes of acceptability is whether the "equal" product performs the needed function in a like manner and with the desired results. See Nicolet Biomedical Instruments, 65 Comp. Gen. 145 (1985), 85-2 CPD ¶ 700. The "equal" product need not be an exact duplicate of the brand name in design or performance. Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207. Rather, the equal product must satisfy the salient characteristics as they are set forth in the solicitation; it generally need not satisfy features of the brand name that are not specified. Lutz Superdyne, Inc., B-200928, Feb. 19, 1981, 81-1 CPD ¶ 114. The procuring agency enjoys a reasonable degree of discretion in determining whether a particular product meets the solicitation's technical requirements as set forth in the salient characteristics, which we will not disturb unless it is shown to be unreasonable. Tri Tool, Inc., B-241703.2, Mar. 11, 1991, 91-1 CPD ¶ 267.

Here, the record establishes that the Air Force reasonably determined that Warren & Baerg's proposed "equal" cuber was equivalent to the brand name. As noted above, the solicitation informed offerors that "equal" products would be evaluated against the "[t]he salient physical, functional and other characteristics . . . specified in the solicitation." For the cuber, these characteristics consisted of the minimum flow rate required for the cuber, the size and physical density for the cubes to be produced by the system, and that the cuber fit generally within the building to be used by the refuse system. The record shows that Warren & Baerg's cuber satisfied each of these requirements.

Rather than asserting that Warren & Baerg's cuber did not satisfy the salient characteristics, SWIS argues that Warren & Baerg's cuber is not the equal of the brand name because the brand name is "heavier," "better engineered," "better built," "more reliable," and "easier to operate," than Warren & Baerg's cuber. As the Air Force points out, none of these "characteristics" were identified in the solicitation as salient characteristics of the brand name cuber, which equal products must meet; instead, as described above, the ease of operation, level of labor, maintainability and life expectancy were identified as evaluation factors against which proposed refuse systems would be evaluated for acceptability.

SWIS appears to have confused the solicitation's stated evaluation criteria with the solicitation's salient characteristics and technical requirements. The equivalency

of equal products is not ordinarily determined by reference to the solicitation's technical evaluation criteria, but to the stated salient characteristics of the brand name and other technical requirements specified in the solicitation. Whereas evaluation criteria inform offerors as to how the acceptability or relative merits of their proposals will be determined, see FAR § 15.605 (FAC 90-7), salient characteristics identify those features of the brand name product that are required by the government to meet its functional needs and inform offerors of the performance standards required of "equal" products. See Adams Magnetic Prods., Inc., B-256041, May 3, 1994, 94-1 CPD ¶ 293.

In addition to finding reasonable the agency's determination that Warren & Baerg's cuber was equivalent to the brand name and therefore acceptable, we also find that the Air Force reasonably determined Warren & Baerg's proposal to be acceptable under each of the stated evaluation criteria. While SWIS generally complains that its system is better than that offered by Warren & Baerg's, the solicitation did not provide for a relative weighing of offerors' technical proposals. As noted above, in a two-step procurement technical proposals are first evaluated for technical acceptability and then award is based upon the technically acceptable offer with the lowest bid price. FAR § 14.501(b). Thus, the determinative issue in this case is not whether SWIS's proposed system is better than Warren & Baerg's, but whether Warren & Baerg's system is acceptable under the stated evaluation factors.

Here, the record supports the agency's determination that Warren & Baerg's proposed system is acceptable. The technical evaluator found that Warren & Baerg's system satisfied the agency's requirements under each of the stated evaluation factors. SWIS has provided no evidence refuting the agency's evaluation, despite having retained an expert/consultant who was admitted to the protective order and received access to all the agency's evaluation documentation. Instead, SWIS complains in its report comments that proposals were evaluated by a single evaluator and not by a panel of evaluators as the offerors were informed by the solicitation, and that the agency's evaluator may not have been qualified to judge the proposals.

'SWIS also complains that the Air Force has no contemporaneous evaluation documentation, evidencing its evaluation of proposals, and argues that the Air Force's post hoc explanation should be ignored. We disagree. While we accord greater weight to contemporaneous source selection materials than documents prepared in response to a protest,

(continued...)

The selection of individuals to serve as proposal evaluators is a matter within the discretion of the agency; accordingly, we will not review allegations concerning the qualifications of evaluators or composition of evaluation panels absent a showing of possible fraud, conflict of interest, or actual bias on the part of evaluation officials. See Astro Pak Corp., B-256345, June 6, 1994, 94-1 CPD ¶ 352; Medical Serv. Corp. Int'l, B-255205.2, Apr. 4, 1994, 94-1 CPD ¶ 305. No such showing has been made here. Given the absence of evidence contradicting the Air Force's evaluation conclusions, SWIS's complaints are no more than mere disagreement with the agency's technical judgment, which does not demonstrate that the agency's evaluation was unreasonable. See ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

The protest is denied.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel

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we consider the entire record, including statements and arguments made in response to a protest, in reviewing an agency's evaluation and source selection. See DynCorp, 71 Comp. Gen. 129 (1991), 91-2 CPD ¶ 575. We have no basis to object to the agency's lack of contemporaneous evaluation documentation, where, as here, there is sufficient documentation in the record to allow us to assess the reasonableness of the agency's evaluation. See Hydraudyne Sys. and Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88.